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FILED The Honorable Marsha J Pechman  
ENTERED  
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JUN 25 2001 MR

cc: TO JUDGE MR

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

LA CONNER ASSOCIATES, L.L.C , a  
Washington Limited Liability Company,

Plaintiff,

v.

ERON BERG; DAN O'DONNELL, MARY  
LAM; JOAN CROSS, and JOHN  
STEPHENS, as individuals,

Defendants.

No. C 01-0225-P

PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO  
DISMISS (FRCP 12(b)(6))

Date June 29, 2001

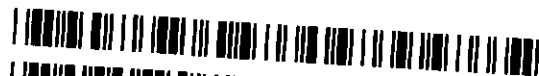
Courtroom of Judge Marsha Pechman

COMES NOW THE PLAINTIFF, by and through its counsel of record, Craig  
D. Magnusson of OLES MORRISON RINKER & BAKER, and hereby responds to and  
opposes Defendants' Motion to Dismiss individual defendants on the basis of their  
claimed absolute immunity afforded to legislators.

I. INTRODUCTION

The individual Defendants have acted in their role under color of state law as  
both the Mayor (Defendants Berg and O'Donnell) and members of the Town Council  
(all individual Defendants) of the Town of LaConner. As set forth in Plaintiff's  
Complaint, the individual Defendants have acted individually and collectively to  
deprive Plaintiff of its Constitutional rights concerning the use of real property

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CV 01-00225 #00000015

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1 located within the Town of LaConner and under the jurisdiction of the town of  
2 LaConner.

3 As a 12(b)(6) Motion to Dismiss, Defendants argue that all of their acts were  
4 legislative in nature and therefore they are entitled to the "absolute immunity" which  
5 is afforded to legislators conducting legislative acts

6 Plaintiff denies that the acts performed by the Defendants were legislative in  
7 nature and asserts that many or all of the acts as they apply to Plaintiff were non-  
8 legislative. Defendants are not entitled to absolute immunity for non-legislative acts,  
9 and their Motion to Dismiss collectively must be denied.

## 10 II. STATEMENT OF FACTS

11 The facts supporting Plaintiff's opposition to Defendants' Motion to Dismiss  
12 are set forth in Plaintiff's Complaint and the concurrently filed Declaration of Vaughn  
13 Jolley, Managing Member of Plaintiff LaConner Associates, L.L.C.

14 Of most significance is the undisputed fact that all of the acts complained of  
15 relate to only two (2) adjacent parcels of land, surrounded by differently zoned  
16 parcels which were not included in the acts (Complaint, ¶¶ 12, 15, 20, 22, 30, 36;  
17 Declaration of V. Jolley).

18 The disputed DNR lease and the new Town of LaConner application for a  
19 shorelines substantial development permit (activities which have occurred  
20 subsequent to Defendants' Answer to the Complaint) relate to the immediately  
21 adjacent tidelands area under lease to Plaintiff and therefore affect the same  
22 parcels.

23 Effectively, all of the acts complained of include, but are not limited to the  
24 enactment of a new statute concerning zoning only for a small, single area located  
25 south of downtown LaConner.

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### III. LAW AND ARGUMENT

Individual defendants are not immune for acts that are administrative or executive in nature. *Trevino v. Gates*, 23 F.3d 1480, 1482 (9<sup>th</sup> Cir. 1994) Council members and mayors cannot simply hide behind a "vote" and the nature of the act and its application must be reviewed to determine if the act or acts are "protected" as legislative in nature.

The burden of proof to establish absolute immunity with respect to legislative acts is on the individual(s) asserting the absolute immunity. In *Trevino, supra*, Los Angeles city council members argued absolute immunity in response to a plaintiff who claimed that the council members violated her civil rights by encouraging the police to routinely use excessive force. In support of her allegations, the plaintiff pointed to specific acts of the council members concerning the payment of punitive damage awards as evidence of policy making decisions. The Ninth Circuit upheld the District Court, allowing the claim to proceed and found that determinations by the city council members that were of limited application are non-legislative in nature and that such decisions are made on a case-by-case basis. With respect to the burden of proof, the Ninth Circuit ruled:

The burden of proof in establishing absolute immunity is on the individual asserting it. '[O]fficials seeking absolute immunity must show that such immunity is justified for the government function at issue.' *Hafer v. Melo*, U.S. 112 S.Ct. 358, 363, (1991) citing *Burns v. Reed*, 500 US 478, 111 S.Ct. (*Trevino* at 1482)

In *Trevino*, the court discussed how court's may differentiate between "executive" and "legislative" acts. Relying on *Bateson v. Geisse*, 857 F.2d 1300 (9<sup>th</sup> Cir. 1988), a matter concerning land development similar to Plaintiff's claim, the court stated:

1 [A]n act which applies generally to the community is a legislative one,  
2 while an act directed at one or few individuals is an executive one.  
3 (*Bateson*, 857 F.2d at 1304 (quoting *Cinevision Corp. v City of*  
4 *Burbank*, 745 F.2d 560, 579 (9<sup>th</sup> Cir. 1984)).  
5 (*Trevino* at 1482)

6 In *Bateson*, a developer of land in the City of Billings, Montana sent in a  
7 number of proposals to the city, the last of which was not approved because of an  
8 ongoing effort by the city council members to rezone the individual area. *Bateson*,  
9 the developer, sued all council members and the City of Billings under 42 USC 1983,  
10 alleging civil rights violations. As with Defendants here, the council members  
11 defended by claiming absolute immunity for legislative acts. The District Court  
12 allowed plaintiff's substantive due process claim while rejecting its procedural due  
13 process claim and inverse condemnation claim. Concerning the distinction between  
14 an executive vs. legislative act, the court found that the council's acts were directed  
15 specifically and solely at a single individual (the plaintiff). Citing from *Cinevision*,  
16 *supra*, the court determined that because the council's acts affected the plaintiff  
17 specifically and not the community as a whole, the acts constituted executive as  
18 opposed to legislative acts. *Bateson* at 1304

19 Defendants rely almost exclusively on *Bogan v Scott-Harris*, 523 U.S. 44,  
20 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) concerning absolute immunity arising out of  
21 "legislative-type decisions." *Bogan* is good law but does not answer the question as  
22 to whether or not any and/or all of the acts undertaken by the Defendants  
23 individually and/or collectively constitute legislative, executive or administrative acts  
24 or decisions. Instead, Defendants simply conclude "the claims and allegations set  
25 forth in Plaintiff's Complaint, even if true and proven, confirm that all the acts or  
26 omissions alleged against Defendants were purely legislative-type actions. . . ."

1 Defendants' Motion at 4 Defendants broadly describe the acts concerning Plaintiff  
2 and the Town of LaConner's agreement, subsequent planning acts and subsequent  
3 decisions in broad, policy making/public interest words while carefully avoiding the  
4 undisputed truth that the "acts" affect at best only two properties and primarily only  
5 affect Plaintiff's property

6 In *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220 (9<sup>th</sup> Cir. 1996), the Ninth  
7 Circuit again confirmed that "the Supreme Court ' has generally been quite sparing  
8 in its recognition of claims to absolute official immunity.'" (Citations omitted).  
9 *Chateaubriand* at 1220 The court looked at two primary factors in determining  
10 whether or not the act was legislative in nature, as follows:

11 First, does the act involve ad hoc decision making, or the formulation  
12 of policy? Second, does the act apply to a few individuals or to the  
public at large? (Citations omitted) *Chateaubriand* at 1220.

13 As set forth in Plaintiff's Complaint, the nature of Plaintiff's claim against the  
14 individual defendants is that they acted adversely to Plaintiff's Constitutional  
15 interests in an ad hoc manner, the exact opposite of what normal "policy making"  
16 decisions would follow The written settlement agreement between the Town of  
17 LaConner and Plaintiff required and committed the Town to a reasonable policy  
18 making procedure; the individual Defendants acted to subvert the process and  
19 outcome in what can only be called an "ad hoc" manner by changing the process,  
20 delaying the process, hiring then firing consultants, acting to restrict public comment,  
21 acting to deny the presentation of the Planning Commission's reports and  
22 recommendations, and ultimately ignoring the unequivocal results of the process  
23 and recommendations to impose an ad hoc result which affects only two properties.  
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1 Under Defendants' theory of absolute immunity and definition of legislative  
2 acts, individuals on the Town Council acting with clear and admitted avarice could  
3 impose development moratoriums and/or rezones or down-zones on individual  
4 parcels of land within their jurisdiction with absolute immunity. As set forth above,  
5 the law does not recognize such absolute immunity if one or a few individuals are  
6 affected as compared to the public or citizenry at large

7 As set forth in ¶ 30 of Plaintiff's Complaint, in the July 1998 settlement  
8 agreement between Plaintiff and the Town of LaConner, they agreed to "engage in a  
9 planning effort to explore alternate developments and available grants that might be  
10 available for development of the shorelands and tidelands." The tidelands adjacent  
11 to the Plaintiff's property have been under a long-term lease by Plaintiff from the  
12 DNR, and provides the primary access for current and potential future developments  
13 on Plaintiff's property with shoreline jurisdiction to the Swinomish Slough. During fall  
14 of 2000, Plaintiff prepared a design for a pier to be constructed in the leased tide-  
15 lands area to continue to service Plaintiff's properties. The Town of LaConner,  
16 through the shorelines substantial development permit process, approved the permit  
17 application. Subsequently, Plaintiff submitted an application to the Washington  
18 State Department of Natural Resources to renew its lease based upon the approval  
19 of the shoreline permit by the Town of LaConner. As set forth in Plaintiff's  
20 Complaint, during early 2001, the Town of LaConner submitted a competing lease  
21 application for the DNR lease area to the DNR without any specific plans for  
22 development.

23 Subsequent to Defendants' Answer to Plaintiff's Complaint, the Town of  
24 LaConner proceeded with a specific shoreline substantial development permit  
25 application for the construction of a pier on the same land, in direct competition with  
26

1 Plaintiff's approved permit and pending lease application. As set forth in the  
2 Declaration of V. Jolley, if approved (which means the rejection of Plaintiff's lease  
3 application), the Town's shoreline permit and lease application further prohibit any  
4 continuing shoreline use of Plaintiff's property and/or any future redevelopment,  
5 even within the restrictions of the proposed new zoning restrictions.

6 The current Mayor and Town Council members are responsible for the  
7 executive decisions to prepare and submit the shoreline application and to pursue  
8 the competing lease application, as set forth in Plaintiff's Motion, page 12, line 11,  
9 page 18, "Leasing or Purchasing Real Property "

10 These acts, standing alone, constitute violations of 42 U.S.C. 1983 on the  
11 part of the Town Mayor and members of the Town Council Under the above  
12 guidelines to determine whether or not an act is legislative or executive in nature,  
13 clearly these acts are not legislative These acts directly compete with and harm  
14 Plaintiff alone and do not constitute any sort of "public policy" on behalf of the  
15 citizens generally.

16 Defendants argument that these acts are legislative in nature because they  
17 benefit the community as a whole was rejected by the court in *Trevino, supra*.  
18 Looking to the nature of the act, the Ninth Circuit stated:

19 We reject this argument. It fails to address the nature of the specific  
20 decisions made by council members pursuant to § 825(b). Although  
21 council members must consider whether payment of a judgment 'would  
22 be in the best interests of the public entity,' (citation omitted) this does  
not mean decisions made pursuant to this section are general policy  
decrees.

23 Every decision by a local legislator can be described as one made in  
24 the best interests of the public. . . . *Trevino* at 1483.

1 Proposing a public dock on leased DNR land immediately adjacent to  
2 Plaintiff's property, in competition with Plaintiff's shoreline permit and proposed  
3 lease, directly damages only Plaintiff and is not the sort of broad policy decision  
4 affecting the community at large for which legislative immunity can be granted.

### 5 CONCLUSION

6 Plaintiff and the Town of LaConner entered into an agreement which directly  
7 and significantly affected Plaintiff's rights concerning the use of its real property.  
8 That agreement has been breached by the Town, through the wrongful acts of the  
9 individual named Defendants acting in their executive and administrative roles as  
10 Mayor(s) and Town Council members. The individual Defendants claim both  
11 absolute immunity and other defenses, justifying a claim by Plaintiff against the  
12 Town of LaConner with the expectation that the Town will be added as an additional  
13 defendant once statutory claim limits have been fulfilled. The individual Defendants  
14 are entitled to claim indemnity from the Town and to demand a defense, to the  
15 extent they believe they were acting in good faith and/or within their legislative  
16 authority.


17 With respect to Defendants' Motion to Dismiss based upon a claim of  
18 absolute legislative immunity, the allegations of the Complaint and the additional  
19 facts set forth in the Declaration of Vaughn Jolley show that the individual  
20 Defendants committed many acts, individually and collectively, under color of law  
21 which violated the Plaintiff's Constitutional rights. The acts were and are not  
22 legislative in nature. Even with respect to the zoning changes, those changes are  
23 not of general policy making but instead only apply to one, or at most two separate  
24 properties. Defendants' 12(b)(6) Motion must be denied.



1 To the extent this Court is not satisfied that the alleged individual acts of each  
2 individual named Defendant constitutes sufficient evidence of executive and/or  
3 administrative acts that violated Plaintiff's Constitutional rights, Plaintiff is prepared  
4 to and requests a ruling from the Court allowing for the filing and service of an  
5 Amended Complaint which will set forth in particular detail individual motions, votes,  
6 approvals, and executive directions and decisions by each individual Defendant to  
7 further establish the individual Defendants' wrongful conduct as it applies to  
8 Plaintiff's real property

9 Respectfully submitted this 25<sup>th</sup> day of June, 2001.

10 OLES MORRISON RINKER & BAKER LLP

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12 By   
13 Craig D. Magnusson, WSBA 12733  
14 Attorneys for Plaintiff  
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